

The Shortfall of International Law on the Threats of Climate Change

By Gabriel Zitrin

If global action is not effective and climate change is not slowed by 2020-30 then critical environmental thresholds are likely to be exceeded, and climate change will become a primary driver of conflicts between and within states. Under this ‘business-as-usual’ scenario there would be massive human suffering and instability across the globe and even the largest global military powers would not be able to defend the security of their global interests, trade, investments and national security.¹

I. Introduction

That someone wrote it does not mean it is set in stone, but if we accept the above statement as true, then it would follow that the international community should immediately make combating climate change among its highest priorities, on a par with preventing a large-scale military conflict among a host of its members. It is unfortunate not only that this is not currently the case, but that the international legal regime currently in place bodes ill for any attempt to mitigate climate change through either science or the law in the foreseeable future.

The effects of climate change, and their implication for international peace and security, are only recent topics of study. And while the world slowly pursues the programs we will need to lessen and mitigate those effects from an ecological standpoint, the international legal regime established by the United Nations Charter in 1945 to

¹ Tom Spencer, Nick Mabey, Chad Briggs, Elena Bellucci & Géraud de Ville, *Climate Change & The Military: The State of the Debate*, Institute for Environmental Security, December 2009, available at <http://www.envirosecurity.org/cctm/StateoftheDebate2.pdf>.

maintain the peace must also come to terms with this new scientific reality.

Despite the decades of the 20th century in which the specter of nuclear annihilation gripped the world, the likelihood of such scenarios has lessened greatly in the wake of the demise of the Cold War-era division of international power.² Projections in the 21st century hold it to be far more likely that the demise of entire nations will be precipitated by encroachment of the sea from below than by the delivery of warheads from above.

Yet the international law regime defined by the Charter of the United Nations is ill-equipped to handle the threats posed to its adherents by the changes in the planet's ecology, and the vast security threats that may result from them. Its role in defusing the doomsday scenarios of yesteryear is undeniable, but its incompatibility with environmental realities that did not concern its framers leaves it an anachronistic liability.

This essay will entail a brief examination of the peril of an affected state: what that state's treaty obligations are, what their rights under the charter are, what the consequences of climate change might be in the Charter's legal terms, what the political realities are with respect to the global fight against anthropogenic climate change, and whether there is any hope reconciling the four.

I hope to demonstrate that at the moment they cannot be reconciled, and that these states therefore need some form of legal recognition of their predicament to accompany the scientific recognition that climate change already commands. Failing to address these issues may present unusual and unpleasant security concerns in the future.

² See, e.g., Zak, Dan, *Doomsday Clock set back by a minute*, Washington Post, January 15, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011402487.html?hpid=sec-artsliving>, albeit in the 'Style' section.

B. A New Kind of “Alarmism”

If the label “alarmism” is frequently applied even to the mere notion that the Earth’s climate is slowly changing, generally for the warmer, then the quotation above and much of what will follow will no doubt seem downright extreme.

The situations I will be describing are extreme, the consequences extreme, the likelihoods of their realization perhaps extremely small. But the seemingly panicked nature of the arguments does not lessen the need for some form of addressing the holes in the international legal regime that I believe dot the landscape. The decades that will elapse between today and any possible ramifications on the order of those I describe are, likewise, unrelated to the need to address these issues.

I do not advocate military action, overt or otherwise, on the part of any state against any other state, for the purpose of lessening their capacity to cause environmental harm. Nor do I believe that an international conflict with such a dispute at its heart is likely within the life span of anyone now inhabiting the planet. My goal in hypothesizing such an eventuality is to draw attention to the collective inaction, not environmentally but legally and scholastically, that would make it more likely to occur.

II. The Threatened State

The changing face of the debate in the United States over the last eighteen months has given new life to the debate over whether anthropogenic climate change has occurred and will continue to occur. This essay is not intended to make the case that climate change has and will continue to occur, in some form and at some severity for the foreseeable future. Instead I will regard such assertions for the purposes of this paper as

scientific fact. But there is a great deal of variance among the projections for the specific consequences that may result from anthropogenic climate change. Writers on the subject who can contribute no *scientific* insight, like myself, must be careful to let the scientists do the science.

To that end: recent projections indicate that the world's oceans will rise approximately one meter over the next hundred years, and perhaps as much as five meters over the next three hundred years, on top of the .2 meters they have risen in the last hundred.³ Under this projection, there are island nations consisting entirely of sufficiently low-lying areas that will cease to exist within those time periods.⁴

A. Two different demises

Islandia is a hypothetical state consisting of multiple low-lying islands with no appreciable elevation. Current projections of sea level rise indicate that whether or not the nation is inundated will hinge in significant part on the emission of carbon on the part of much larger states who are in greater need of energy consumption to drive larger, transforming economies.

If such higher-emission, more populated states were to launch a sudden military assault upon Islandia, at least two things would almost undoubtedly happen. First, Islandia would effectively cease to exist as a state, due to obvious military inferiority. Second, international law would condemn the assault as contrary to those customary tenets banning aggression that date back to the earliest writings on the subject of war, and are codified in the UN Charter.

If those same states merely continued as they are, and current projections as to sea

³ Wynn, Gerard. *Two meter sea level rise unstoppable: experts*, Reuters, Sept. 30, 2009, available at <http://www.reuters.com/article/idUSTRE58S4L420090930>.

⁴ Id.

level rise are realized within the next 100 years, Islandia would cease to exist as a state just as it would due to military defeat, but the protections that international law affords against this eventuality are noticeably absent.

The previously conceived notion of military conquest and the threat faced from environmental degradation are at least somewhat similar in their practical effect. Insofar as the former is one of the oldest subjects of international law, and the latter is not yet seen as having any legal significance, they both will result in the state's demise.

III. Article II, Section 4

This section of the United Nations Charter embodies a principle so basic, and so endemic to the purpose of the organization, that even someone only passingly familiar with the United Nations would assume that some form of it appears somewhere in its founding documents. It is quoted here in its entirety.

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁵

Would a high-emissions, economically advanced state violate this section of this Article by launching a military assault on Islandia? Even a cursory examination reveals that they would. While there can be, and has been, plenty of debate and scholarship over what actions short of military assault fall within the definition of “use of force,” it would be difficult to argue that a military attack does not fall within Article II, section 4.

But is contributing to the demise of other states by contributing to climate change likewise forbidden by the provision of the Charter designed to deter military conflict? It

⁵ United Nations Charter, Art. 2, § 4.

does not appear so. To determine whether contributing, knowledgeably, even recklessly, to global climate change runs afoul of section 4 necessitates a closer look at its parts.

A. The threat or use of force

The contemplation of pollution as “the threat or use of force” is beyond the pale. That which someone is “forced” to do is that which they were unwilling to do of their own accord. Islandia would have to show that the world’s collective contribution to climate change had any relationship to “forcing” them into action. This would be somewhere between difficult and impossible to accomplish, with the additional hurdle that, if we are to follow this argument, no state in the world is completely free of responsibility for climate change

B. Territorial integrity

Section 4 forbids “the threat or use of force against the territorial integrity or political independence of another state.” Is climate change “against the territorial integrity” of Islandia? Current projections of sea level rise due to anthropogenic climate change would be not so much a *breach* of Islandia’s territorial integrity as its outright destruction. If a state’s territory was previously on land and is slowly sinking, it is fairly clear that that state’s territorial integrity is threatened within the meaning of the section, or else the phrase was meant to have no legal significance at all.

C. Political independence

Sea level rise projections tell us that Islandia will eventually cease to exist as a political entity, a construct with meaning within the system of international governments. Governments have existed in exile, outside the bounds of their own territory, but not when their entire physical territory was no longer afloat. As with our inquiry into

“territorial integrity,” to find that political independence is not implicated requires an unrealistic interpretation of the language of section 4.

D. Contributing to climate change does not violate Article 2, section 4

That polluting does not constitute a “threat or use of force” effectively ends any Article 2, section 4 claim before it begins. Thus we return to the most fundamental question that naturally arises from such dire predictions: what options are available for Islandia to protect its territorial integrity and ensure the continued existence – the political independence, if we may shoehorn it into the language of the charter – of their state in its present form?

IV. Article 51

Faced with its own demise, can a state use force to defend itself from the projected impacts of climate change? The UN Charter makes it clear that it is not only acceptable but expected for parties to use whatever means are at their disposal to ensure their own survival. This is embodied in Article 51 of the Charter, here quoted in relevant part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security.”⁶

A. Armed attack

That the definition of “armed attack” is so open to interpretation may have been deliberate on the part of the drafters of the Charter,⁷ though it is also possible that this

⁶ United Nations Charter, Article 51.

⁷ See, e.g., Tarcisio Gazzini, *The changing rules on the use of force in international law*, Manchester University Press (Manchester), 1995, p. 119.

openness resulted from an impasse over such a definition between competing global interests at the dawn of the Cold War.

But while its precise definition remains elusive, “armed attack” must be seen to have a narrower definition than the prohibition of Article 2, section 4 of “the threat or use of force”. A “threat” of force is prohibited under Article 2, section 4, while any action that meets the standard of Article 51, enabling self-defense, requires such a threat to have come to fruition. In addition, the root of the word “armed” seems to imply that the attack itself is undertaken with tools traditionally used for the specific purpose of achieving an injurious or lethal objective. The word “attack” cannot have a meaning devoid of intent to achieve some objective at the expense of another party.

The International Court of Justice places the definition of “armed attack” well above the incidental activity by polluting states with which we concern ourselves here.

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. . . an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’.⁸

It is true that the court is here attempting to expand the definition of “armed attack” beyond the traditional notion of an incursion by formal armed forces, but its expanded definition is still far removed from the incidental consequences that are those of anthropogenic climate change.

⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. In I.C.J. Reports 1986, p. 103, citing United Nations General Assembly Resolution 3314 (XXIX).

Put another way, the objective of eliminating a susceptible low-lying state, even if direct military action were forsworn, could hardly be accomplished by maximizing the burning of fossil fuels in an attempt to melt it out of existence. The crux of the dilemma is that to afford such a state a fighting chance of surviving the collective collateral damage of the actions of the entire world, we would, under the current international legal regime, be forced to permit just such an unrealistic allegation.

At least one other additional factor counsels against equating climate change with military action even if in certain circumstances their consequences are similarly destructive.

B. Immediate threat to human life

One major difference between the negative consequences of climate change and those of an armed attack is the proximity of the threat to human life. An armed attack takes human lives by its very nature, but while climate change has been speculatively linked to human fatalities,⁹ its effects, being slower and more foreseeable, only cause fatalities indirectly.

Consider an armed attack on Islandia which, like climate change, the country has minimal power to mitigate, and which, like climate change, is projected to destroy potentially all territory comprising the nation. Certainly the armed attack scenario entails immediate human casualties, people killed by the very physical act of war. But those same citizens are unlikely to remain on their islands to die over the course of the years it would take for the sea to gradually submerge them. They will, rather, leave before such an eventuality comes to pass, which they cannot necessarily do if their state comes under

⁹ The World Health Organisation estimated that there were 150,000 climate change fatalities worldwide between 1975 and 2005. *Nature* 438, 310-317 (November 17, 2005).

military assault.

This contrast must have some effect on how we evaluate these two parallel threats in comparison to one another.

C. The dilemma of the threatened state

Because

‘armed attack’ is a much narrower notion than ‘threat or use of force’. . . the stunning conclusion is to be reached that any state affected by another state’s unlawful use of force not reaching the threshold of an ‘armed attack’, is bound, if not exactly to endure the violation, then at least only to respond by means falling short of the use or threat of force.¹⁰

As for Islandia, a state whose territorial integrity or political independence is threatened by the actions of member states not rising even to the “threat or use of force,” they appear to be fairly well boxed in. While the inclusion of the phrase “territorial integrity or political independence” in Article 2, section 4 indicates that these are among the paramount rights of a member state, there is a gaping hole in their ability to guard them; a right without a legal remedy.

This is not an oversight, and it is no one’s fault. Climate change was not established science at the time of the composition of the charter, nor indeed for decades afterward. But be that as it may, even while the consequences of climate change can be viewed increasingly in terms of international peace and security, the United Nations is now, as a body, completely ill-equipped, under its own charter and given the composition of the Security Council, to deal with any such security issues. There must be some effort to eliminate the eventuality wherein vulnerable states suffer all the consequences of

¹⁰ Albrecht Randelzhofer, *The Charter of the United Nations, a Commentary*, Bruno Simma, ed., Oxford University Press 1995, p. 664.

climate change with the entire world clothed in the blanket of total legality.

V. The Limited Scope of a Conflict of Mutual Adherence

Another way of framing Islandia's dilemma is to examine the curious effect of the United Nations legal regime. The relationship between the "threat or use of force" prohibited by Article 2 and the "armed attack" required by Article 51 necessitates an unfortunate reading of the current state of the law that has worrisome implications for the battle against climate change.

It is an often and accurately cited fact that the United Nations Charter neither outlaws, nor hopes to completely prevent, war. But despite the surface truth of this assertion, a closer examination of the Charter reveals that there can be no war between two parties to the charter in which *neither* party has run afoul of it. This provision is no doubt by design on the part of the framers of the UN Charter, who may have dreamt of peaceful relations between UN members at a time when those members did not comprise every state in the world recognized by the international community.

Escalating actions between State A and State B that end in full international conflict may certainly provoke, along the way numerous cries on both sides that the other is threatening, and subsequently using, force against the territorial integrity of another state. There will be any amount of parsing who crossed which line before whom.¹¹ We

¹¹ One recent example would be the 2008 war between Russia and Georgia, the technical instigation of which was disavowed to no end by both parties. See, e.g., Chivers, C.J. & Barry, Ellen, *Georgia Claims on Russia War Called Into Question*, New York Times, Nov. 6, 2008, available at http://www.nytimes.com/2008/11/07/world/europe/07georgia.html?_r=1. The point of this section is that *who* instigated our hypothetical conflict is in fact irrelevant so long as the conflict escalates to the point where Articles 2.4 and 51 are implicated.

have seen that not every instance of “the threat or use of force” arises to the level of an “armed attack” in response to which collective self-defense is permissible. But at some point in such an international conflict, there are two possibilities. Either the territorial integrity or political independence of one or both states will be gravely threatened, or the damages to both parties will not rise to the level projected to impact several states as the long-term effects of climate change begin to take place. In the first instance, wherein states are threatened on that same order, it is difficult to see how this could be accomplished without some action on the part of the other belligerent rising to the level of “armed attack” under the meaning of Article 51. Upon the commission of this attack, regardless of their chances of success, at the very least a threatened state is entitled under that article to defend itself with whatever means it has at its disposal.

But while there is clearly an effort to limit the scope of a *military* conflict where all parties concerned adhere unerringly to their international legal obligations, there is no such comforting limitation available with respect to climate change. The entire world can collectively adhere itself into perpetuity and yet succeed only in making the threat to world security worse and worse.

VI. Can the UN Security Council Take Action?

Although the argument is far from complete, we might say we have loosely established that an affected state has no obvious remedy available to it under the most extreme form of protection the law allows. This holds even (or especially) if those states most affected do not generally have the political clout, and in no way the military capacity, to dissuade the international community as a whole from pursuing the policies

that may destroy them.

What hope does it have of relief in the form of action from the UN Security Council, charged as that body is with the maintenance of international peace and security?¹² Surely the cessation to exist of one of the parties to the body granting the Security Council its power must generate some notice.

Chapter VII of the United Nations Charter gives to the Security Council the most direct authority in its power to change the course of world events. Under Article 39 of the Charter, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.” In what must be considered an extreme example of cession of sovereign authority in international law, the decisions of the Security Council are facially binding on all parties to the UN Charter.¹³

It must be noted at the outset that the Article 39, and the power it confers, is divided into two parts: the power of determination, and the power of decision on measures to be taken. Both belong to the same grantee, and as they are granted in conjunction with one another by the Charter, so have most often been exercised by the Security Council.

A. Determination of a threat

There exists wide latitude for interpretation of Article 39, perhaps an unusual amount given the extraordinary powers it confers. As one far too polite source puts it, “[t]he relationship of [a threat to the peace] to the concept of endangering the

¹² United Nations Charter, Article 24, § 1.

¹³ *Id.* at Art. 25.

maintenance of international peace and security as expressed in Arts. 34 and 37, which belong to Chapter VI, is not evident.”¹⁴

But an examination of the structure of Security Council resolutions yields the inescapable conclusion that there is in fact one unifying element of those situations deemed threats to international peace and security by the UN Security Council. That element is simply their appearance in those resolutions after those “magic” words that enable the Council’s Chapter VII authority.

Recent examples worded with varying degrees of vagueness include “Eritrea’s actions undermining peace and reconciliation in Somalia as well as the dispute between Djibouti and Eritrea,”¹⁵ “the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia,”¹⁶ “the continuing situation in East Timor,”¹⁷ and “Iraq’s non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles”.¹⁸

A hypothetical Security Council resolution “acknowledging that the effects of anthropogenic climate change constitute a threat to international peace and security” would necessarily authorize the full force of the Council’s power. To argue otherwise would require the presence of an element common to prior usages of the phrase not contained in this particular resolution. I do not believe that there is any such element, or that any more would be required besides the proposed language above.

Therefore, the UN Security Council could declare the effects of climate change to

¹⁴ Jochen Frowein, *The Charter of the United Nations, a Commentary*, Bruno Simma, ed., Oxford University Press 1995, p. 610.

¹⁵ United Nations Security Council Resolution 1907 (2009).

¹⁶ United Nations Security Council Resolution 1851 (2008).

¹⁷ United Nations Security Council Resolution 1272 (1999).

¹⁸ United Nations Security Council Resolution 1441 (2002).

constitute a threat to international peace and security if it so chose. It might even be right, given the scientific projections of the threats some states are facing.

VII. The Great Political Wall

But the Security Council is not likely to make such a finding any time soon. It takes no extraordinary insight to see the political obstacles that block such extreme action. Given the permanent veto power over all Security Council resolutions, granted in Article 27, section 3 of the UN Charter, of some of the world's major contributors to climate change, the political stalemate which has characterized much of the history of the United Nations with respect to security issues seems likely to continue with respect to climate change.

Since that time, those members of the international community with the power to defeat a finding by the Security Council that it constitutes a threat to international peace and security have advanced no binding targets on carbon emissions. This stands in stark contrast to these same nations' consistent acknowledgment that climate change presents a serious threat.¹⁹ But public pronouncements with no legal weight will always be easier to swallow than effective action, especially when military and security matters are implicated.

"The UN could define what is international peace and security," says David Sullivan, former Deputy Legal Advisor at the National Security Council. "Would it ever do so? The answer is a resounding no. It's a political organ, and it's going to act politically."

¹⁹ See, e.g., Joint declaration on Climate Change between China and the European Union, Sept. 2, 2005, available at http://ec.europa.eu/environment/climat/pdf/china/joint_declaration_ch_eu.pdf.

A. Domestic politics

The methods by which countries can be bound by international legislation are limited. A binding treaty, which was the unrealized objective of the November 2009 Copenhagen conference, or a UN Security Council resolution are the only two means by which states are likely concede that their actions to combat climate change are mandated.

But political realities make each of these prospects equally unrealistic. There are grave considerations of economic development which make cooperation from the higher-emissions countries of the developing world unlikely in the near future. Any Security Council resolution lacking the support of the United States will not pass to become binding, and any international treaty to which the United States is not a party will go the way of the ineffective Kyoto Protocol.

Thus, any progress in the field of binding international targets requires political support in the United States first. “You’ve got to have domestic action before you have a treaty,” Sullivan maintains. “A binding measure on climate is going to be an advice and consent treaty. There needs to be U.S. political will, because it’s going to have to get through the Senate.”

Meanwhile, Security Council action “doesn’t require the Senate, but we wouldn’t have a legislative problem, you’d have an executive problem. In order to carry out our international legal obligations, which it could only carry out through domestic legislation.” No matter the method, there can be no international legal progress without action from Washington.

This is a Herculean task, because in all of history there has never been a more comprehensive and determined worldwide coalition of financial and political interests arrayed *against* action on a particular issue as there is with respect to climate change. The same United States Senate that would have to ratify a treaty on carbon emissions has essentially doomed the American Clean Energy and Security Act of 2009, which reflected the same binding emissions caps that have thus far appeared only in treaties stymied by the absence of U.S. ratification.

“The fact that you had [the Act] actually drafted, discussed and kicked out reflects recognition that there is a need to actually do something on climate,” Sullivan says. Perhaps, but it would be equally fair to say that the fact that its prospects of becoming law have dried up entirely reflects a lack of the very same recognition in the United States government in any way that actually affects environmental policy.

Climate change policy and environmental policy in general may once have been evaluated independently of the partisan political process in the United States, but those days are long over. Battle lines have been drawn such that the left-right dichotomy traditionally used to frame more understandably political issues has infiltrated the climate change debate as well. “Though the [American Clean Energy Security Act] would have little impact on world temperatures,” writes the Heritage Foundation, “it is a massive energy tax in disguise that promises job losses, income cuts, and a sharp left turn toward big government.”²⁰

²⁰ William Beach, Karen Campbell, David Kreutzer, and Ben Lieberman, *The Economic Impact of Waxman-Markey*, The Heritage Foundation, May 13, 2009, available at <http://www.heritage.org/Research/Reports/2009/05/The-Economic-Impact-of-Waxman-Markey>.

This mentality would seem to have been reflected in the US House of Representatives, which passed the bill 219-212, with only eight Republican representatives voting in favor.

To consign the will to tackle climate change to the province of either the left or the right, to reduce it the entire debate to the level of that occupied by comparatively mundane concerns when the threat concerns the entire world, is mind-boggling. But how long such a mentality can prevail is an open question, as indeed is the closely related question of just what the long-term impact of climate change will be on the United States. There may be fewer and fewer instances in which those across the American political spectrum can put aside their differences and embrace a (very often tragedy-induced) cause, but surely if the Florida coastline stops at Orlando in 100 years instead of Key West, we can anticipate some sort of unified movement from the US government designed not to let things get any worse.

B. Foreign politics

The Security Council, with its five permanent veto-wielding members, presents no less of a political minefield than the U.S. Senate. So few states mentioning military action in the context of climate change in a way that binds all UN member states is likely only to destroy the Council's credibility. "If you're going to try to fix a problem like that, the Council isn't the place to do it because the Council is a subset of the world community," Sullivan says. "If you push the system too hard, you're going to have people opting out."

This is to say nothing of the resistance at least two permanent members of

the Security Council, China and the United States, have shown to the notion that they would accede even to binding targets on carbon emissions.

Such needless risking of the Council's credibility provides a disincentive, then, for even the most ardent environmentalist concerns to turn to the UN for help in dealing with a problem it might ordinarily expect to come within its core mission of protecting international peace.

Because of the myriad political impossibilities, perhaps the exercise of decrying of the glaring inadequacies of international law is of little to no utility. ““There is no international legal cure,” Sullivan says. “It’s not a fix for what is essentially a political problem.”

How to drum up political will to counteract climate change is a complicated subject that continues to generate no shortage of ideas, but only limited successes. If history is any guide, political support for combating climate change will most likely take the form of a *reaction* to disaster rather than a desire to prevent it. And looking out across today's world, with a global economic crises, disease pandemics both underway (AIDS) and potentially looming (H1N1), and the certainty of the detriments of climate change under an astonishing assault in the United States and around the world, disaster seems more likely than science to spur action in the political sphere. And without action in the political sphere, as we have demonstrated, we cannot give states the tools they need to avert disaster. It is a catch-22 that seems to have us destined for some sort of catastrophe.

C. Parties that are taking notice

Despite worldwide concern about climate change, despite the body of work the UN itself conducted on the subject (eventually culminating in the Nobel Peace Prize), the Security Council's first mention of climate change in an international security context was not until 2007.²¹ But increasingly, world authorities, including some with military focus, have begun to recognize the potential security implications of climate change in addition to its widely discussed potential ecological effects.

The United States government, to date no great supporter of accepting binding targets on emissions reduction, is conducting new studies of the effects of climate-induced crises, and American responses to them, on the country's national security. The National Intelligence Council recently released its first assessment on the subject, warning that "[t]he demands of these potential humanitarian responses may significantly tax U.S. military transportation and support force structures, resulting in a strained readiness posture and decreased strategic depth for combat operations."²²

The National Defense University, run by the United States military, ran a war game in December of 2008 simulating a flood in Bangladesh that results in a mass movement of refugees streaming into neighboring India.²³ The traditional humanitarian concerns with which the United States would ordinarily be occupied were naturally not the only focus of the military establishment in doing so. "Such climate-induced crises could topple governments, feed terrorist movements or destabilize entire regions, say...

²¹ Climate Change and International Security, Paper from the High Representative and the European Commission to the European Council, March 14, 2008, available at

http://www.consilium.europa.eu/uedocs/cms_data/docs/.../en/reports/99387.pdf.

²² John M. Broder, Climate Change Seen as Threat to U.S. Security, New York Times, August 8, 2009, available at

http://www.nytimes.com/2009/08/09/science/earth/09climate.html?_r=3&hp.

²³ *Id.*

experts at the Pentagon and intelligence agencies.”²⁴

Since 2002, the Institute for Environmental Security, based in the Hague, has pursued its mission “to advance global environmental security by promoting the maintenance of the regenerative capacity of life-supporting eco-systems.” Their warning that opens this paper is well-taken, and courageous in its addressing of an issue in terms sure to ruffle the feathers of anyone, no matter how sympathetic to global environmental concerns, who is hesitant to confront such daunting and dangerous conflict scenarios.

The European Union Commission, together with the Office of the High Representative, unveiled their jointly prepared landmark report in 2008.²⁵ The 2007 report of the military advisory board of nonprofit think tank Center for Naval Analyses pulled no punches in its assessment of American security challenges due to the effects of climate change. “We will pay for this one way or another,” said board member Anthony Zinni, a retired Marine General and former commander of United States Central Command. “We will pay to reduce greenhouse gas emissions today. . . or we will pay the price later in military terms.”²⁶

But all of these warnings, no matter how dire, and all of the accompanying recommendations, no matter how urgently proffered, are confronted by the same

²⁴ *Id.*

²⁵ Even so, it must be said that their insight was far from Earth-shattering. The Danish Ministry of Foreign Affairs, in advance of their nation holding the long-awaited climate summit of 2009, saw fit to summarize the recommendations of the report as follows: “1) the initiation of further studies on the linkages between climate change and security at a regional level, 2) that the climate change and security linkages and analysis of regional consequences be further integrated in dialogue with third countries, and 3) that consideration should be given to how security policy aspects of climate change can be incorporated in EU’s regional strategies such as the EU-Africa strategy.”

²⁶ National Security and the Threat of Climate Change, CNA Corporation, 2007, p. 33, available at http://securityandclimate.cna.org/report/SecurityandClimate_Final.pdf.

difficulty with the current international legal regime that frustrates countries whose very existence is projected to be in jeopardy.

IX. Painting the Darkest Possible Picture

Disturbingly, it may just be a blessing to all who seek a peaceful international community that the states most threatened thus far by the projected impacts of climate change have been among the smaller and less populated countries of the world. They have not been among the great military powers or wielders of great influence in world affairs. But while the thought of anyone waging open war over the issue of climate change is farfetched, it is unlikely at this stage that the United States or China would still be staging photo opportunities as the centerpiece of their programs to combat climate change if their entire populations were heading for refugee status in the next 100-300 years at the outside.

I wrote above that the political deadlock over climate change in the United States could not likely survive the current project impact of letting it run its course. But what more could the United States will itself to do if it were to suddenly find itself threatened?

Small island states with minimal military capacity will not be the only ones whose security will be implicated by the projected consequences of climate change. What such consequences could prompt larger and better equipped countries to take drastic, even preemptive military, action? The displacement of large numbers of its citizens from low-lying areas? The incursion of masses of refugees from neighboring states? A steep weather-driven decline in agricultural production? The economic downturn and widespread hunger which could result from such decline? All are not only possible

consequences of climate change over the next century, but are already being mentioned as security risks on the horizon in many of those same areas of the world.

To prevent its realization, we must, as unpleasant as the task is, confront the darkest picture of what lies ahead. This is, simply put, the use of force, in defiance of a body of existing international law found to be inadequate to protect national interests, to eliminate target states' capacity to perpetuate the effects of climate change.

Let's return to our hypothetical country of Islandia, only now we'll give it the military capacity of India. Will they sit back and adhere to their UN obligations to their eventual doom? More realistically, assume any number of real-life states facing some form of long-term territorial threat from climate change, with varying levels of military capacity at their disposal. Strategically, is it so difficult to envision the world's heads of government concluding that their survival may depend on them destroying as much as they can of the world's capacity to warm itself? Is it so impossible to imagine that the coal mines of Linfen, China would become an immediate military target? That Brazil would be forced to accommodate foreign forces if it were unable to control illegal burning of its own forests?

How worried will we be about "international peace and security" then?

X. Recommended Actions to Avoid the Most Severe Potential Climate Conflicts

A. Climate change is not intentional conduct

No action to address the deficiencies of the legal regime can compare to the need to aggressively combat climate change, a process that as of this writing is moving in fits and starts at best, and in the United States has stalled altogether, at least on the

governmental level.

But from a legal rather than environmental perspective, more than adopting any more concrete legal regime, the international community must recognize and assign legal significance that states which contribute to climate change knowingly endanger fellow states. The *intent* to harm a state, or in the Charter's language, intentional actions "against the territorial integrity and political independence of another state," cannot be established in the case of climate change. But a *mens rea* of *knowledge* can be so established -- unless a contributing state is prepared to argue, and the international community is prepared to agree, that climate change does not pose a threat to the territorial integrity or political independence of UN member states.

Let us turn for a moment to the UN General Assembly Resolution that the ICJ held in *Nicaragua v. United States* to be customary international law on the subject of what constitutes an "armed attack" within the meaning of Article 51 of the UN Charter. While reprinting the definition (attached to the resolution) in its entirety would be unnecessarily cumbersome, even a cursory perusal of its provisions makes clear that some form of hostile intent is required to fit the definition.²⁷ I make no objection to this, but it can no longer be denied by world governments that, at the very least, to contribute to climate change is to knowingly contribute to an incursion upon the territorial integrity of other states.

Must there be legal significance to the *knowledgeable* harm that is the incidental byproduct of economic and industrial activity? For obvious reasons this cannot under present circumstances even be contemplated. *All* states contribute in at least some minor

²⁷ Again, this is United Nations General Assembly Resolution 3314 (XXIX) of 1974.

sense to climate change, though the amount by which they do so differs by orders of magnitude. But even if there is no further immediate significance to this designation, it would perhaps advance the conversation if all parties were to think of contribution to climate change on their part as a *knowledgeable* contribution to its resultant effects. It is a legal designation that may have the effect of refocusing governmental appreciation of public policy in regards to climate change.

But aside from out of the goodness of their hearts, how can we really expect, in a more concrete way, that states will change their behavior even if they acknowledge this environmentally relevant *mens rea*?

B. We cannot currently deter even *knowledgeably* harmful behavior

The next logical step would be to impute legal consequences to refuse to mitigate a state's contribution to climate change within defined criteria. But given the potential economic consequences, is it wise or even possible to create these consequences, whatever form they may take? Would they not infringe on the economic development of countries whose populations are depending on it?

If there is a right to development guaranteed by international law, it may quickly be incompatible with the right to remain free of the consequences of such development. Is there such a right?²⁸ There is at least some opinion that there is: for example, Nagendra Singh, former President of the International Court of Justice, stated that "a right to development is a recognized principle of international law beyond dispute. It is founded on the principles of the U.N. Charter, namely sovereign equality of States, non-

²⁸ For an overview of the history of the right to economic development, see Greg Maggio & Owen J. Lynch, *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society* (1997).

discrimination, the principle of inter-dependence and of international co-operation."²⁹

C. Current policies remain hostile

Singh's native India not only agrees with the above principle as an official policy, but gives it as a reason not to more aggressively mitigate its own contribution to climate change. One governmental source opined in advance of November 2009's Copenhagen summit to address climate change that "the problem . . . has been created by the carbon profligacy of developed countries, and so India's right to economic development cannot be imperiled by emissions caps designed to make up for Western progress."³⁰ And this no less not from the Minister for Development, as one might expect, but rather from the Minister for Environment and Forests!

Even the Institute for Environmental Security, though "development" is neither of the disciplines contained in its name, shares the goal of alleviating poverty as articulated by the Millennium Development Goals and the Plan of Implementation of the World Summit on Sustainable Development.³¹ None of these goals can necessarily be understood to be achievable in a manner reducing the contributing factors of global climate change.

China and India, tellingly, prefer to set emissions goals not in terms of emissions output, but in terms of "emissions efficiency," or emissions per unit of gross domestic product. Thus, given a rapidly expanding economy, even an aggressive cut in emissions efficiency, such as the 40% cut by the year 2020 that China announced in 2007,³² could

²⁹ *Id.*

³⁰ Neeta Lal, India to Refuse Mandatory Emissions Goals, Interpress Service, October 5, 2009, available at <http://www.allbusiness.com/trade-development/economic-development-emerging-markets/13151478-1.html>.

³¹ <http://www.envirosecurity.org/about/>.

³² Emma Graham-Harrison, China rejects caps, aims to cut 'carbon intensity', The China Post, April 17, 2007, available at

represent an increase in total carbon emissions. This is a striking example of the primacy of economic development, in countries understandably preoccupied with it, with respect to climate change.

That the world as a whole, with a particular focus on China, India and the United States, must act together against climate change to prevent or mitigate the effects of devastating environmental consequences is already known. But how big of a hornets' nest will we be kicking to ask whether the same world, with the focus on the same states, must pursue the same goals to avoid not only the ecological ramifications of failure, but those that risk armed hostilities by states desperate to survive, or to hold what they already have?

It has at least been put forward in the scientific community that enough sea level rise is already a foregone conclusion to make clear that mitigation efforts alone will not alleviate the need for the international community to handle the issue once the consequences begin.³³ If this proves to be correct, the regime designed to prevent a repetition of world war will have suffered an abject failure.

In short, in response to the question of what to do to prevent the most dire possible scenarios that could result from the failure to confront either climate change or its relation to the international legal *jus ad bellum* regime, I have no definitive answer. But if climate change will truly be “a primary driver of conflicts between and within states”³⁴ over the coming decades, there should be no lack of scholars looking for one.

D. A political problem requires a political solution

“If there is hope,” Orwell wrote, “it lies in the Proles.” Though the government of

<http://www.chinapost.com.tw/news/archives/international/2007417/107326.htm>.

³³ Wynn, *supra* note 2.

³⁴ Spencer, *supra* note 1.

Oceania was far less likely than today's real world government of China to respond to popular demand for anything at all, a renewed collective public consciousness about climate change would seem to be, by mere process of elimination, the only thing standing between today's world and the frightening vision of tomorrow's found above.

XI. Conclusion

It is hardly a foregone conclusion that a finding by the Security Council that climate change constitutes a threat to international peace and security would solve anything today. That the Council's power to make such a finding is open-ended would not stop this from being a tremendous expansion into public policy of a power clearly not designed for such a wide scope. Climate change might soon not be the only new way that states could claim that their territory had been infringed upon. But the newfound focus on environmental conscience, a new wave of studies detailing the projected consequences of climate change, and a new focus on what these will mean for international security have yielded no meaningful way to avoid any of them.

What will change in the future to steer clear of the unpleasant scenarios above? Is there any cause to believe that by the year 2020, either the developed or the developing world will consent to binding emissions targets to replace the expired Kyoto protocol? In the aftermath of what must be called a failed summit at Copenhagen in December 2009, the respect afforded the long-term development goals of China, India, and the heavily populated states that buttress them, and the renewed domestic political resistance in the United States to any form of binding target, there is no reason to think that such a binding agreement is on the horizon.

Climate change itself, and the need to change our collective behavior, was only slowly and grudgingly acknowledged by the international community. Likewise, the first step towards adjusting the international legal regime with respect to climate change must be to acknowledge at some level that the system as it stands is inadequate.

Meanwhile, the political winds in key states are unlikely to shift anytime soon. It was only in December, after the Copenhagen conference, that Indian Minister for Environment and Forests Jairam Ramesh openly declared that “India would never agree to any legally binding emission cut or accept any agreement that stipulated a ‘peaking’ year for carbon emission.”³⁵

Similarly, the United States is unlikely to undergo a sudden shift on the issue of binding targets, even having just undergone two sudden shifts in the political landscape in successive elections. The debate over whether the Barack Obama administration’s climate change policies are significantly more aggressive than those of the George W. Bush administration can be and is being discussed at length in more appropriate venues. What is not in debate is that on the specific issue of binding carbon emissions targets, the two have thus far proven indistinguishable.

The prospect of the international community, be it in the form of the United Nations or otherwise, invading strictly domestic spheres of policy worldwide has long been among the primal fears of the sovereign state. While fully justified, does this fear have any further utility when its alternative, followed in perpetuity, has entirely legal but universally unacceptable consequences?

Are we headed for such an apocalyptic future? Will our descendants be bombing

³⁵ Aarti Dahr, Jairam Ramesh: 20-25 % carbon emission intensity cut by 2020, *The Hindu*, Dec. 4, 2009, available at <http://www.hindu.com/2009/12/04/stories/2009120456550100.htm>.

the Linfen coal mines? It is doubtful. Society does not trend toward self-destruction, but toward salvation, or at least perpetuation. The Montreal Protocol of 1987 that limited the use of chlorofluorocarbons and other ozone-depleting substances can legitimately be said to have saved the world, as hyperbolic as that statement may be.

And yet there is no readily apparent means of averting such a future without aggressive shifts in the environmental policy stances of major world governments where contribution to climate change is a major concern. These governments, even those that cannot accurately be classified as democracies such as China, are only likely to respond to the will of their people. Political bodies act politically, but they do not adopt their policies in a vacuum. They react to the forces that choose whether or not to keep them in power.

But I think that just as the worst possible response to climate change would be to fail to acknowledge the problem, the way to make the “climate war” scenario most likely would be to fail to recognize and attempt to correct the holes that currently dot the international legal landscape. Here I hope to do no more than give a profile to the problem and perhaps even jumpstart thinking about potential solutions.